Filed 3/9/10 In re Isabella L. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ISABELLA L., a Person Coming Under the Juvenile Court Law.	B217112 (Los Angeles County Super. Ct. No. CK76292)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. PHILIP L., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Emily Stevens, Judge. Affirmed.

John E. Carlson for Defendant and Appellant.

Office of Los Angeles County Counsel, James M. Owens, Assistant County Counsel, Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

Philip L. (father) appeals from a jurisdictional order of the juvenile court, by which the court found true an allegation that father's daughter, Isabella L., was a child described by Welfare and Institutions Code section 300, subdivision (b)(1).[1] We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2008, father and Isabella's mother (mother) separated, began living apart, and were "co-parenting" Isabella. On December 30, 2008, Isabella, then four years old, told a family friend, Monica S., that father had touched Isabella on her "pepa" (a Spanish-language term used to describe the vulva) while father and Isabella were playing pattycake. Monica S. asked Isabella to demonstrate how Isabella and father played pattycake. Isabella sang a song and, at the conclusion of the song, "made a movement with her hand towards her skirt, at the area where her vulva would be." Monica asked Isabella to repeat the song. Once again, at the conclusion of the song, Isabella "made a hand gesture as if she was wiping herself." Isabella stated she did not like it when her daddy touched her "pepa," but she had not told father this because she felt "embarrassed." When Monica S. asked if Isabella would like Monica S. to tell father Isabella did not like father touching her "pepa," Isabella replied "yes."

Isabella had also made similar statements to mother earlier the same day, and mother promptly made an appointment with Isabella's pediatrician. Dr. Sharon Wollaston examined and interviewed Isabella on January 2, 2009, to "rule out sexual abuse." Dr. Wollaston reported "[n]o significant physical findings" and her conclusion regarding alleged sexual abuse was "[u]ncertain." During the exam, Isabella told Dr. Wollaston that father had touched her vagina while she was sleeping in father's bed, and that she ran away. Although Isabella told her mother she had touched father's penis, Isabella told Dr. Wollaston she had not touched father's penis. Father denied having touched Isabella's vagina other than to apply a topical antibiotic cream that Isabella's doctor had prescribed for a rash on her face and buttocks. This occurred in early

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

December 2008, after mother had sent father an e-mail directing him to apply the ointment "up her nose and inside the lips in her vagina (softly) where the infection is/was . . . ." Father told DCFS social worker Christie Parkin that he had applied the cream "many times a day for more than one day," and that Isabella did not like it. Father also told Ms. Parkin that he was "very relaxed about nudity" and this was never a problem for mother when they were married. However, mother told Ms. Parkin that father had "a history of being nude in his home during both sleep and waking hours." Mother also reported a fairly recent incident in which mother found father sleeping naked in Isabella's bedroom. Father told mother and the DCFS social worker that he had worn shorts when he first fell asleep on Isabella's bedroom floor, but that he must have kicked off the shorts during his sleep. Mother also reported that father had been showering with Isabella since the parents' separation, but had stopped doing so at mother's request.

On January 19, 2009, Isabella was interviewed at Children's Hospital by Sandra Himmelrich, a licensed social worker who often conducts forensic interviews for sexual abuse cases. Ms. Himmelrich conducted separate interviews with Isabella and each parent. Father told Ms. Himmelrich that the allegations arose after Isabella was taught "an inappropriate game of 'pattycake' . . . in child care." Ms. Himmelrich described Isabella as "comfortable throughout the interview, easy to engage and build rapport with, and appeared bright and curious." Isabella "felt comfortable correcting incorrect statements and stated she didn't know answers when appropriate." She "remained engaged throughout the interview, calmly playing and talking except for at one time in the interview when she disclosed that [father] had touched her vaginal area. At this time [Isabella] became very hyper moving about the room, tossing her dolls in the air and very evasive to questions not giving answers even to direct questioning but changing the subject." Eventually, Isabella would "answer the question on her own without it being reasked."

Although DCFS had received a child abuse referral from Dr. Wollaston on December 30, 2008, DCFS did not file a section 300 petition until February 18, 2009,

after it had conducted its initial investigation. The petition contained allegations pursuant to section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse).

At the detention hearing on February 18, 2009, the juvenile court found DCFS had made a prima facie case for detaining Isabella. The court detained Isabella from father's custody but granted him monitored visitation. The court also ordered DCFS to refer Isabella for counseling, and ordered the parents and family members not to discuss the case.

In a March 18, 2009, report prepared for the jurisdiction/disposition hearing, DCFS social worker Arabelle Van Ranzow recommended that father be ordered to complete a DCFS-approved parenting program, a DCFS-approved "sexual abuse program for offenders," and individual counseling.

A contested adjudication hearing was held on April 21, 2009. Father stipulated that he had showered or bathed with Isabella until September of 2008, and that he "fell asleep in the child's room and kicked off his shorts in the middle of the night." The court stated that the facts contained in the reports were "essentially accurate," and "the issue comes down to what was the father's motivation." Father's counsel agreed with the court that father's position was "all the touching was totally appropriate and there aren't any boundary issues."

Isabella testified in chambers. She stated that she had fun when she went to father's house, but when asked if father had done anything with her that she didn't like, she replied father had "touched my private parts." This occurred on five different days and Isabella felt "bad" when it happened. Isabella stated that when father touched her she would "go up in my bunk bed . . . so he couldn't catch me." When questioned by her counsel, Isabella stated she had told Monica S. "what my dad did." Isabella then pointed between her legs. Isabella stated that she liked "just visiting" with her dad but wanted to do so "with somebody watching. Because I'm scared. And I'm thinking in my mind if he's going to do something wrong or not." Isabella stated again that father had touched her private parts more than one time, and he was not helping her apply medicine when he did so. She said that on one occasion, when she was sitting on the couch, father touched

her "inside my panties" and she told him to stop because "it wasn't a good thing to do that" and it made her feel "bad." Isabella said she did not feel safe with father. She denied several times that father had ever put medicine on her private parts.

At the conclusion of the hearing, and after extensive argument by counsel, the court dismissed the allegation pursuant to section 300, subdivision (d) (sexual abuse). The court amended, then sustained, the allegation pursuant to section 300, subdivision (b). As amended, the sustained allegation read as follows: "On numerous prior occasions the child Isabella [L.] has disclosed that her father has touched her in the vaginal area. Minor has reported that this touching made her uncomfortable and that she has asked the father not to touch her in that manner. Minor has also reported that she does not feel comfortable alone with the father. The minor's perception that she has been touched in an inappropriate manner by the father, the minor's expressed unwillingness to be alone with the father, as well as the father's unawareness of appropriate boundaries in the father-daughter relationship, places the minor at risk of physical and emotional harm in the care of the father at this time."

The court ordered both parents to participate in counseling and a "sex abuse awareness" program. The court stated that father "didn't know where the boundaries were where he should stop. But I think he's going to have to learn that." The court emphasized that the sexual abuse awareness counseling was "very different from counseling for perpetrators . . . and if they send the father to the wrong program, it will be an issue."

DISCUSSION

The petition was facially sufficient to support a finding of jurisdiction.

Section 300 provides in pertinent part: "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the juvenile court: . . . (b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ."

Father contends that the juvenile court erred when it made the jurisdictional finding that Isabella might suffer "serious physical harm or illness" based solely on Isabella's "perception" that father had touched her in an inappropriate manner and father's alleged "unawareness of appropriate boundaries in the father-daughter relationship." Father notes that although the juvenile court cited its belief that there was a risk of *emotional* harm to Isabella as the result of father's behavior, there was no basis on which the court could conclude there was a substantial risk of *physical* harm.

Father cites *In re Alysha S.* (1996) 51 Cal.App.4th 393, for the proposition that a touching of a child which is found to be "inappropriate," but not sexual in nature, cannot support jurisdiction under section 300, subdivision (b). In that case, it was alleged that the father had touched the child's vagina and buttocks in a manner the mother felt was inappropriate. The touching had occurred over a year before mother made the accusation, at a time when the parents were separated and the child was an infant and toddler. It was further alleged that the father was "'physically abusive and violent to the mother and was arrested and incarcerated for domestic violence against the mother.'" (*Id.* at p. 396.) The County's Department of Human Services had abandoned an allegation in its section 300 petition that the father had sexually abused the child. However, the Department asserted an allegation, pursuant to section 300, subdivision (b). The court held there was no basis for the juvenile court to exert jurisdiction over the father under section 300, subdivision (b), because the Department had abandoned the sexual abuse allegation and the touching alleged in the petition had occurred over a year before the petition was filed. Even though the parents had resumed living together at the time the petition was filed, there was no evidence the child was at a substantial risk of harm at that time.

Alysha S. is factually distinguishable from this case. The child in *Alysha S.* was nonverbal, the accusation against the father had been made only by the mother, and the alleged inappropriate touching appeared to be an isolated incident and had occurred over a year before the section 300 petition was filed.

In this case, five-year-old Isabella was "verbal and articulate." The allegations in the petition were not based merely on Isabella's "perception" that father had touched her in an inappropriate manner. Isabella stated to no fewer than four individuals (her mother, Monica S., Dr. Wollaston and Ms. Himmelrich) that father had touched her private parts a number of times, that the touching had occurred recently, and that she asked father not to touch her in that manner. The petition was amended to conform to the evidence that had been presented to the court, which included evidence of the emotional harm that was evident in Isabella's fear of being alone with father.

We agree with father that there was no evidence Isabella had suffered any *physical* harm at father's hands. However, the court sustained the petition based on its belief that Isabella could "harm herself" in her attempts to elude father as the result of father's actions. For example, Isabella testified that once after father continued to touch her after she asked him to stop, she went "up in my bunk bed . . . so he couldn't catch me." Isabella told Dr. Wollaston that on one occasion, when she woke up and father was touching her vagina, she ran away "on the swings--I was so high he couldn't reach me."

Substantial evidence supports the court's jurisdictional findings.

We review the juvenile court's jurisdictional findings under the substantial evidence standard. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) Under this standard of review, we examine the entire record in a light most favorable to the juvenile court's findings and conclusions, and defer to the juvenile court on issues of credibility of the evidence and witnesses. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.)

Father contends the juvenile court sustained the petition based upon "inconsistencies and contradictions in the evidence," and in spite of its finding that Isabella was "not credible." Father has misstated the court's comments. The court believed that Isabella understood the difference between the truth and a lie. However, because Isabella was only five years old and different people had been "talking to the child in a different circumstance, a different place. Asking the question in a different way is going to get different information from the child. . . . [T]o try to reconcile as best as possible doesn't mean that at any time the child is lying." Here, the court

acknowledged there was not sufficient evidence to sustain an allegation under section 300, subdivision (b), because Isabella made what appeared to be an isolated statement that she had touched father's penis. However, Isabella's statements to the effect that father had touched her vagina were consistent on each occasion where she was questioned on this issue. Father points to the fact that Isabella "crossed her fingers" to indicate that she "knew that if you cross your fingers you do not have to tell the truth," and that her fingers were crossed during a portion of her testimony. The juvenile court did not view this as an indication that Isabella was not credible, and neither do we. The court considered all the evidence before it, not just Isabella's testimony. The evidence before the court, including reports by professionals in the area of child abuse who interviewed Isabella, provides substantial evidence to support the court's findings.

Father points to the fact that the court did not make specific findings that would support removal of Isabella from father's custody.[2] Certainly it would have been preferable for the court to have made those specific findings. However, we may imply the necessary findings where, as here, we have found there is substantial evidence to support them. (*In re Andrea G.* (1990) 221 Cal.App.3d 547, 554-555.) Further, even if we were to find that the court erred when it failed to make specific findings, the error would be harmless because it is not reasonably probable the findings would have been in father's favor. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1137; *In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.)

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[2] Section 361, subdivision (c), provides in pertinent part: "A dependent child may not be taken from the physical custody of his or her parents . . . unless the juvenile court finds clear and convincing evidence of any of the following circumstances . . . : (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody."

DISPOSITION

The jurisdictional order is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.